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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT SEATTLE

8 COSTCO WHOLESALE CORPORATION,  
9                   Plaintiff,

10                  v.

11 ARROWOOD INDEMNITY COMPANY,  
12                  Defendant.

13                   NO. C17-1212RSL

14                   ORDER GRANTING LEAVE TO  
15                   AMEND COMPLAINT

16                  This matter comes before the Court on “Costco’s Motion for Leave to Amend  
17                  Complaint.” Dkt. # 22. Plaintiff filed this lawsuit in July 2017 seeking a declaration that  
18                  defendant had a duty to assume obligations under an excess insurance policy issued by its  
19                  predecessor in interest, Royal Insurance Company of America. Through discovery, plaintiff has  
20                  apparently concluded that, not only did defendant assume Royal’s obligations, but it breached its  
21                  contractual duties and acted in bad faith when adjusting plaintiff’s claims. It now seeks to amend  
22                  its complaint to add causes of action for breach of contract, bad faith, violation of the  
23                  Washington Consumer Protection Act, and violations of the Insurance Fair Conduct Act.  
24                  Defendant opposes the motion, arguing that the motion is untimely under the case management  
25                  order and that the amendment is improper under Fed. R. Civ. P. 15.

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27                   ORDER GRANTING LEAVE TO  
28                   AMEND COMPLAINT - 1

1       The deadline for amending pleadings was originally May 9, 2018, but was extended by  
2 stipulation of the parties to June 20, 2018. Plaintiff filed its motion to amend on that date.  
3 Because a party cannot control when the Court rules on a particular motion or request for relief,  
4 the undersigned views the amendment deadline as the date by which a party must provide a copy  
5 of the proposed pleading and request leave to amend. Plaintiff's motion was, therefore, timely.  
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7 Because plaintiff need not seek an extension of a case management deadline, the good cause  
8 standard of Fed. R. Civ. P. 16 does not apply.

9       Under Fed. R. Civ. P. 15, courts "should freely give leave [to amend] when justice so  
10 requires." There is a "strong policy in favor of allowing amendment" (Kaplan v. Rose, 49 F.3d  
11 1363, 1370 (9th Cir. 1994)), and "[c]ourts may decline to grant leave to amend only if there is  
12 strong evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated  
13 failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing  
14 party by virtue of allowance of the amendment, or futility of amendment, etc." Sonoma County  
15 Ass'n of Retired Employees v. Sonoma County, 708 F.3d 1109, 1117 (9th Cir. 2013) (internal  
16 quotation marks and alterations omitted). The underlying purpose of Rule 15 is "to facilitate  
17 decision on the merits, rather than on the pleadings or technicalities." Lopez v. Smith, 203 F.3d  
18 1122, 1127 (9th Cir. 2000).

21       Defendant opposes the motion to amend on the grounds that it is untimely, the  
22 amendment will cause prejudice, and the proposed claims are futile. Defendant's arguments  
23 regarding undue delay are based on plaintiff's allegations regarding failures to communicate and  
24 investigate that occurred while the underlying litigation was wending its way through the courts  
25 and mediation. To the extent plaintiff is asserting claims based on events that occurred years  
26

1 ago, there was certainly some delay. It is unclear, however, whether defendant, the successor of  
2 a third layer excess insurer, had any duty to investigate, communicate, defend, or indemnify  
3 before the underlying insurance policies were exhausted and/or the insured's obligation to pay  
4 the settlement proceeds was triggered. It is entirely possible, as defendant recognizes in its  
5 opposition memorandum, that some or all of the claims plaintiff is seeking to assert only recently  
6 accrued. Defendant offers no explanation for how plaintiff could unduly delay the assertion of a  
7 claim that accrued two months before - or possibly even one month after - the motion to amend  
8 was filed.

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10       Defendant also argues that it will be prejudiced by the proposed amendment because  
11 (a) the new claims will dramatically expand the scope of relief requested and (b) the discovery  
12 and pretrial deadlines are fast approaching. Whereas plaintiff was originally seeking only a  
13 declaration of coverage, it now seeks actual and exemplary/treble damages arising from  
14 defendant's allegedly wrongful refusal to provide a defense after April 2018 and/or to promptly  
15 confirm that it would fund the settlement in July 2018. The original claim could have been  
16 decided based primarily on the policy language: the new claims will require additional discovery  
17 regarding the insurer's conduct and motivations. The parties' six week stipulated extension of  
18 the motion to amend deadline means that there will be less than three weeks remaining in the  
19 discovery period by the time this issue is resolved. Any prejudice may be ameliorated by a  
20 continuance of the remaining case management deadlines, however.<sup>1</sup>

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24       <sup>1</sup> Defendant argues that it would be harmed by any continuance of the trial date because it intends to fund  
25 plaintiff's settlement obligations with a contractual right for reimbursement if this coverage dispute is decided in  
26 its favor. Thus, the argument goes, “[d]elay in resolving this coverage action would harm Arrowood's recovery of  
27 these funds from Costco.” Dkt. # 29 at 11. Defendant's interests are presumably protected by the negotiated  
28 contract terms: a mere delay in entering judgment for one party or another will not prejudice their legal rights in  
any way.

1       Finally, defendant argues that the proposed amendments are futile. If the new or revised  
2 claims would be immediately subject to dismissal under Rule 12(b)(6), there is no reason to put  
3 defendant through the unnecessary expense and delay of responding to the amendment.  
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5       Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998) (noting that the general  
6 rule favoring amendments does not apply if the amendment would be an exercise in futility or  
7 subject to dismissal). Because the futility argument arose in the context of a motion for leave to  
8 amend, the parties had limited space in which to argue the merits of plaintiff's claims. For  
9 purposes of this motion, the Court finds that the proposed allegations are sufficient to allow  
10 amendment. With regards to the breach of contract claim, plaintiff specifically alleges that the  
11 underlying policy limits were exhausted in April 2018 and that defendant failed to make a timely  
12 coverage decision or indemnify plaintiff as required by the terms of its excess policy. Liability  
13 typically attaches under excess policies "only after the primary coverage is exhausted" (Diaz v.  
14 Nat'l Car Rental Sys., Inc., 143 Wn.2d 57, 63 (2001)), and plaintiff has adequately alleged  
15 exhaustion and other facts giving rise to a plausible inference of damage.<sup>2</sup> Plaintiff's bad faith  
16 and statutory claims are based on alleged regulatory violations which, if proven, may support the  
17 claims asserted. The Court specifically declines to decide at this juncture whether an insured  
18 seeking to enforce a duty to defend and/or indemnity under its own policy of insurance is a "first  
19 party claimant" for purposes of RCW 48.30.015.  
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22       For all of the foregoing reasons, plaintiff's motion for leave to amend is GRANTED.  
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24       <sup>2</sup> Defendant argues that there can be no damages associated with the alleged breach because it has agreed  
25 to pay the attorney's fees, costs, and settlement amounts at issue. Accepting defendant's representations as true,  
26 the agreement to pay was reached only after plaintiff filed its motion to amend and still requires plaintiff to pursue  
27 this litigation to a judgment. The proposed allegations give rise to a plausible inference that plaintiff has incurred  
28 additional fees and costs associated with defendant's handling of this case, notwithstanding the subsequent  
agreement to front the settlement funds.

1 Plaintiff shall file and serve its amended complaint within seven days of the date of this Order.  
2 An amended case management order extending the discovery and other pretrial deadlines will be  
3 issued shortly.  
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5 Dated this 7th day of August, 2018.

6 Robert S. Lasnik  
7 Robert S. Lasnik  
8 United States District Judge  
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ORDER GRANTING LEAVE TO  
AMEND COMPLAINT - 5